

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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Application of)	
)	
ATLAS AIR, INC.)	Docket OST-2009-0077
)	April 20, 2009
for an exemption from 49 U.S.C. § 41101)	
(U.S. – Afghanistan))	
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Application of)	
)	
EVERGREEN INTERNATIONAL)	Docket OST-2009-0090
AIRLINES, INC.)	
)	
for an exemption (U.S. – Afghanistan))	
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CONSOLIDATED REPLY OF ATLAS AIR, INC.

Communications with respect to this document should be served on:

Adam R. Kokas
Sr. Vice President, General Counsel
& Chief Human Resources Officer
ATLAS AIR, INC.
2000 Westchester Avenue
Purchase, NY 10577-2543
(914) 701-8576 - Telephone
(914) 701-8333 - Fax
adam.kokas@atlasair.com

Russell E. Pommer
Associate General Counsel & Sr.
Director, Regulatory Affairs
ATLAS AIR, INC.
1747 Pennsylvania Ave., NW,
Suite 875
Washington, D.C. 20006
(202) 822-9121 - Telephone
(202) 822-9152 - Fax
rpommer@atlasair.com

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With a single exception (Evergreen International Airlines, Inc. ("Evergreen")), all carriers polled in response to the March 31, 2009 application of Atlas Air, Inc. ("Atlas") for Afghanistan exemption authority indicated the absence of objections. Evergreen has now filed its answer, an Afghanistan application of its own and a motion to consolidate. This constitutes Atlas' reply to the three Evergreen filings.

The gist of Evergreen's argument is that *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), requires the Department to withhold approval of the Atlas application until it can determine whether the Government of Afghanistan will grant both the Atlas and Evergreen applications on the basis of comity and reciprocity. Thereafter, should the Department determine that Afghanistan will not grant both applications, Evergreen seeks

a comparative evaluation of the applications in a formal DOT proceeding. Atlas submits that is the wrong approach.

First, *Ashbacker* does not require a comparative proceeding because there, in contrast to the present situation, the applications were indisputably mutually exclusive. That is true, too, in the vast array of situations in which the Department has applied *Ashbacker* principles (e.g., where bilateral agreements limit the number of U.S. carrier designations, frequencies or code-share alliances). Here, in the Afghanistan situation, there are no bilateral restrictions of any sort, and thus no legal reason why the Department should limit itself to selecting only one carrier.

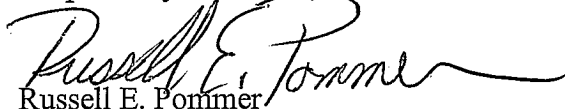
Second, setting a precedent by deferring action on Atlas' application in order to ascertain how many scheduled cargo airlines Afghanistan might accept would weaken U.S. international aviation policy. Such a course would be tantamount to announcing that the Department intends to make the likelihood of foreign governmental approval a prerequisite to new route authority, thus undermining its efforts to expand the extent to which the international aviation environment is driven by market forces.

On many occasions, the Department has awarded extra-bilateral route authority to U.S. carriers without first determining what the applicable foreign government's response would be. There is no reason why the Department ought to proceed in a more guarded fashion here, just because there happens to be no underlying bilateral agreement between the United States and Afghanistan. Furthermore, the Department has already rejected the specific approach Evergreen is suggesting here. In 2003, following the lifting of

prohibitions on various Iraq transactions, several U.S. carriers applied to the Department for U.S.-Iraq exemption authority. The Department granted the applications despite Evergreen's argument that the Department should first determine the nature of the aviation relationship between the United States and Iraq and, "if a limited-entry situation, then the Department should not grant the applications, but rather institute a comparative selection proceeding." *Applications of World Airways, Inc., Northwest Airlines, Inc. and Kalitta Air, Inc.*, Order 2003-6-20 at 3. While the Department did not address Evergreen's specific argument, it noted that, "at this point, we are not persuaded that any allocation procedures are warranted in light of uncertainty with respect to the exact level of capacity constraints . . . compared to the level of proposed carrier service." *Id.* At 4.

Atlas would have no objection to a grant of the Evergreen application as well as the Atlas application. We urge the Department, however, to grant the Atlas application as soon as possible.

Respectfully submitted,



Russell E. Pommer
Associate General Counsel & Sr. Director,
Regulatory Affairs
ATLAS AIR, INC.
1747 Pennsylvania Ave., N.W., Suite 875
Washington, D.C. 20006

April 20, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have, this 20th day of April 2009, caused a copy of the foregoing reply to be served by e-mail on all persons listed below:

<u>Name</u>	<u>Representing</u>	<u>E-mail</u>
Edward W. Sauer	Evergreen	esauer@ssd.com
Carl B. Nelson, Jr.	American	carl.nelson@aa.com
Hershel Kamen	Continental	hkamen@coair.com
Sascha Vander Bellen	Delta/Northwest	sascha.vanderbellen@delta.com
Jeffrey A. Manley	United	jeffrey.manley@united.com
Howard Kass	US Airways	howard_kass@usairways.com
Nancy Sparks	FedEx	nssparks@fedex.com
David L Vaughan	UPS	dvaughan@kelleydrye.com
Kevin Montgomery	Polar	kevin.montgomery@polaraircargo.com
John L. Richardson	Amerijet	jrichardson@johnlrichardson.com
Pierre Murphy	Arrow	pmurphy@lopmurphy.com
Mark Atwood	Kalitta	matwood@sherblackwell.com
Mark McMillin	World	mcmillin@woa.com
Marshall S. Sinick	Florida West	msinick@ssd.com
John Allen	FAA	john.allen@faa.gov
John Byerly	DOS	byerlyjr@state.gov


Russell E. Pommer